Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1996

MOST REVEREND GEORGE LYNCH, and
BROTHER FIDELIS MOSCINSKI, C.F.R.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As a matter of procedural due process of law, the District Court should have been required by the Court of Appeals to entertain and decide Petitioners' affirmative defense under the Natural Law that the District Court should factually and legally recognize, find as a fact, and protect the actual existence of human life before birth and expressly advance the protection of preborn human life as the Court's reason for exercising its broad equitable discretion to decline to issue injunctive relief in the case at bar. In that context, the legal questions presented for review are: –

A. Whether the Judicial Department of the United States has the power to recognize the existence of actual human life before birth. See *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

B. Whether an Article III Judge can properly use the Natural Law to rule that a federal statute, or even part of the federal constitution itself, is unjust and void. See *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 622-663, 22 L.Ed. 455 (1874).

PARTIES

Most Reverend George Lynch is a bishop of the Roman Catholic Church and is retired auxiliary bishop of the diocese of Raleigh, North Carolina, now residing in the Bronx. He was sued by the United States of America in the District Court as "George Lynch," his name prior to his ordination.

Brother Fidelis Moscinski is a Franciscan Friar of the Roman Catholic Church and is a member of the Community of the Franciscans of the Renewal (C.F.R.). He was sued by the United States of America in the District Court as "Christopher Moscinski," his name prior to his entry into religious life.

None of the Petitioners are corporations under *Rule 28.1* of the Rules of this Court.

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DECISONS BELOW

The unreported decision and summary order of the Court of Appeals (A1 to A5) was entered on December 11, 1996 and affirmed a permanent injunction under the Freedom of Access to Clinic Entrances Act (the "Access Act"), 18 U.S.C. 248, enterd by the District Court on February 23, 1996 (A28 to A29).

The decision of the District Court granting the permanent injunction, dated February 21, 1996, is also unreported and is reproduced in the Appendix at A6 to A15.

Prior to the decision in the Court of Appeals the District Court entered an Order holding Petitioner Lynch in Civil Comptempt (A30). Subsequent to the decision of the Court of Appeals the District Court issued a second decision and order in a criminal contempt proceeding (A16 to A29). This decision and order, which have not yet been reported, were entered in the District Court on January 14, 1997 and were appealed by the United States of America to the Court of Appeals on February 5, 1997, Docket No. 97-1092.

JURISDICTION

The judgment of the Court of Appeals was entered as a Summary Order on December 11, 1996 and this petition is filed less than 90 days from that date.

This Court has jurisdiction under 28 U.S.C. 1254(1) to review the judgment of the United States Court of Appeals.

STATUTORY PROVISIONS

The statutory provisions of 18 U.S.C. § 248 (the "Access Act") are, in pertinent part, as follows:

> **§ 248. Freedom of access to clinic entrances**
>
> **(a) Prohibited activities.** – Whoever –
>
> (1) by force or threat of force or by *physical obstruction,* intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
>
> * * *
>
> shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c).
>
> * * *
>
> **(e) Definitions.** – As used in this section:
>
> **(1) Facility.** – The term "facility" includes a hospital, clinic, physicians's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.
>
> * * *
>
> **(4) Physical obstruction.** – The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.
>
> **(5) Reproductive health services.** – The term "reproductive health services" means reproductive health services provided in a hospital,

clinic, physicians's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

18 U.S.C. § 248 (a)(1), (e)(1), (4) & (5) (emphasis added).

Course of Events

Effective date of Access Act:	May 26, 1994
Publication of *EVANGELIUM VITAE:*	March 25, 1995
Petitioners' first post-Access Act rescue:	May 13, 1995
Access Act Complaint filed:	October 30, 1995
Access Act Permanent Injunction filed:	February 26, 1996
Petitioner LYNCH's post-injunction rescue:	April 3, 1996
District Court declines to rule on Natural Law:	April 17, 1996
Petitioners' post-injunction rescue:	August 24, 1996
Petitioner LYNCH's civil contempt order filed:	August 27, 1996
Court of Appeals affirms permanent injunction:	December 11, 1996
Petitioners' criminal contempt acquittal order filed:	January 14, 1997
Government appeals from acquittal order:	February 5, 1997

STATEMENT OF THE CASE

In the early morning hours of Saturday, May 13, 1995 and Saturday, August 24, 1996, the petitioners, a retired Roman Catholic Bishop, George Lynch, and a young Franciscan Friar, Brother Fidelis Moscinski, prayed the Holy Rosary as they sat several feet apart in the driveway apron of an abortion clinic in Dobbs Ferry, New York. Guided by a deep sense of duty and commitment towards life, Bishop Lynch held his rosary in one hand and his breviary in the other, at times sitting on a empty milk crate as he prayed. Brother Fidelis, following his calling and living out the principles of his spiritual father, Saint Francis, also prayed and served witness. His head was bowed, as he sat cross-legged on the cool pavement in his friar's robe, holding his rosary in one hand, and displaying an image of the Holy Mother of God, Our Lady of Guadalupe in the other, using his left knee to balance the portrait.

The "rescues" of May 13, 1995 and August 24, 1996, which were nearly identical and both fully videotaped, present a unique record before this Court.

Supporters of the two petitioners, about a dozen or so individuals, primarily other religious brothers and sisters, also prayed the Rosary as they walked in a circle at a nearby picket area set up by the police on these two days. Persons, all persons, walked freely by the petitioners: police officers, medical personnel, patients, escorts, and others went to and from the clinic entrance without restriction or hindrance. Their paths traversed between, in front of and in back of the petitioners. The petitioners' prayer protest lasted about one-half hour on each of these two mornings before the police arrested them and carried them off to a van or bus which transported them to jail.

This model type of "sit-in" was an act of rescue in its purest form.[1] Bishop Lynch and Brother Fidelis were not motivated by, nor is there evidence that their conduct embodied antagonism, resentment or hatred. Nor would it be plausible for the government to suggest that one might perceive such ill intentions from their humble manners. In fact, the record is plainly devoid of complaints about their comportment. Police officers called to the scene were relaxed and even jovial. At several junctures in the prayer of the Rosary, Bishop Lynch stood to stretch his legs and chatted politely with them.

When persons sought entry or exit from the Dobbs Ferry clinic, the petitioners' response was to just pray on. Yes, it would have been hard for anyone entering or leaving the Dobbs Ferry clinic to miss sight of them or ignore them. But that, after all, was part of the idea. The petitioners prayed openly in the driveway, risking arrest, so that those considering an abortion, upon entering the Dobbs Ferry clinic, would understand the seriousness of their own contemplated actions, examine their consciences and hopefully not go forward with an abortion.

These men, dedicated to principles of peace, forgiveness, mercy and love, prayed to the Mother of Christ to intercede with Her Son on behalf of the plight of pre-born

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[1] The District Court, referring to the August 24, 1996 rescue, drew the distinction between the Petitioners, conduct and prior protest movements: "What I saw on tape was a minimum obstruction of an abortion clinic in a totally peaceful way. I saw no resistance to the police, as there was even back in the '60s when civil rights demonstrators were being arrested, kicking and yelling. Actually, there was more yelling going on by a pro-choice protester at the scene than there was for them. I saw the tape." Tr. 10/15/96 at pp. 49-50.

infants. That prayer had nothing whatsoever to do with intentional contempt for any Court or the Dobbs Ferry police.[2] Rather, the petitioners were simply living out their faith, obedient to their calling to protect life under the Evangelical and the Natural Law.

Theirs was a prayer of hope – an appeal to our divine Creator, acknowledging sorrow at the number of abortions across our land. It was an expression of grief and sadness for the pre-born infants who will never know what it means to love and to be loved in this life, who will never experience a parent's embrace, nor ever know the happiness of family life and, above all, who will never be able to hand on to their children the hope and faith in a loving God. It was a prayer that had to be said, at that place in that driveway apron, at the gate of the Dobbs Ferry abortion clinic where innocent lives were being taken. These urgent prayers were necessitated by the imminent deaths of pre-born infants. As well, the threatened affliction of post-abortion syndrome on the women participating in abortion was at hand.[3] No lobbying or legislative proposals could stop these tragedies.

As they prayed, Bishop Lynch and Brother Fidelis requested forgiveness and mercy for our Country, appealing to God to grant all of us wisdom, generosity and courage – courage to mend our ways and to return us to the sanity of a genuine respect for life and the rights of others at all stages of life. They prayed for the pre-born

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[2] See Testimony of Bishop Lynch, Tr. 10/15/96 at pp. 18-19 ("I had no thought of being contemptuous of this Court." . . . "I never go on any rescue intending to cause any inconvenience or any kind of disrespect for the police.")

[3] See Testimony of Bishop Lynch, Tr. 10/15/96 at p.17 lines 1- 21, p. 19 line 1 to p. 21 line 4.

infants, their mothers, the medical personnel, escorts, police officers, picketers and themselves.

Here we have conduct, *religious prayer* in conjunction with peaceful protest, in the greatest traditions of our Nation. The prayer and its participants expressing a message of love which no doubt impacted its intended audience, owing mostly to the pious manner and fervent sincerity of both Bishop Lynch and Brother Fidelis, but also owing to the selfless disregard which these religious men had toward their own arrest.

As described by the seminal modern Catholic theologian, John Henry Newman, obedience to one's faith must be pure and not given to concern over consequences:

> Now, the truest obedience is indisputably that which is done from love of God, without narrowly measuring the magnitude or nature of the sacrifice involved in it.

John Henry Newman, Selected Sermons, Sermon XV – Self-Contemplation, pp. 120-135 (Paulist Press, 1994). The petitioners were remarkable examples of persons living their faith on that August morning in Dobbs Ferry.

> THE COURT: So why did you think it was necessary to block the driveway?
>
> THE WITNESS (Brother Fidelis): I think what it comes down to, your Honor, is our belief that *human life is sacred*, and *if we are going to say that, we are going to have to be willing to make a sacrifice to substantiate that belief*. Therefore, to show the seriousness of the act, a woman who is going into the place, and she sees people willing to be arrested, might think twice about the seriousness or the gravity of the situation.

Tr. 10/15/96 at p.34 lines 13-22 (emphasis supplied).

Similar prayerful conduct at abortion clinics across this land has changed minds and hearts and in the process saved lives. Prayer *is* powerful.

And now, in this action, the United States Government has had enough of abortion protest and wants even this prayer stopped, permanently. Is the government really bothered by the minor inconvenience of the petitioners' position at a driveway entrance? Of course not. State penalties were sufficient redress for that.[4] The United States Government is bothered because allowing prayer to escape the purview of the Access Act has the unwanted consequence of permitting persons seeking abortion to change their minds,[5] thereby sparing innocent pre-born life.

It is indeed alarming that our government, through the prosecution of this case, has chosen a path of fear, seeking to protect the institution of abortion at any cost. The target subjects, carefully chosen here, are the religious, these two men praying the Rosary.

As Saint Thomas More has said:

> This is one of the ancientest laws among them, that no man shall be blamed for reasonings in the maintenance of his own religion. For Kyng Utopus . . . made a decree, that it should be

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[4] In October 1996, Bishop Lynch served a 19-day prison term in Westchester County, New York for his protest activity on August 24, 1996. Brother Fidelis served 10 days in jail for August 24, 1996.

[5] "[T]he Government speaking on behalf of the clinic has consistently said that the turnaround rate or the no-show rate goes up from 10 percent to 50 percent when there is a rescue." Statement of Counsel A. Lawrence Washburn, Jr., Tr. 10/15/96 at p. 53 ll. 11-15. See Complaint, paragraph 13 (Docket Entry No.1, filed 10/30/95): On May 13, 1995, only 5 of the 15 women scheduled for 8:00 A.M. appeared.

> lawful for every man to favore and follow what religion he would, and *that he might doe the best he could to bring others to his opinion, so that he did it peaceably, gently, quietly, and soberly, without hasty and contentious rebuking and inveighing against others.*

Bishop Lynch and Brother Fidelis were doing the best they could to convince others, peaceably, of their witness to the truth and value of pre-born life. Their particular format of action, in great part, was a function of their positions in the Church:

> Q. Why did you feel that you should go so far as to rescue, which means being arrested, usually?
>
> A. (Bishop Lynch) I had the good example of a great many other people, including one bishop, who had taken part in Operation Rescue, and I decided that since I am able better than most people who are pro-life to be able to take part in Operation Rescue, that therefore I should do that.
>
> Q. Why would you be better suited, your Excellency?
>
> A. Well, at the present time, because of the so-called FACE Act, which has very severe penalties, many pro-life people cannot prudently take part in Operation Rescue because they would be risking financial ruin. They wouldn't be able to support their families. They wouldn't be able to look forward to sending their children and their teenagers to college. I in my circumstances do not have those restrictions. And so it's the least I can do to take part in Operation Rescue.

Tr. 10/15/96 at p. 15 line 13 to p. 16 line 4.

The petitioners, as representatives of the Roman Catholic Church were, in fact, living out and exercising their faith. Their actions were duty oriented.

His Holiness Pope John Paul II documents the duty of all Catholics to protest abortion in the recent Church Encyclical Letter on The Gospel of Life, *Evangelium Vitae*. This guidepost of the Catholic Faith called upon the petitioners to be courageous advocates of the pro-life cause:

> Just as a century ago it was the working classes which were oppressed in their fundamental rights, and the Church very courageously came to their defense by proclaiming the sacrosanct rights of the worker as a person, so now, when another category of persons is being oppressed in the fundamental right to life, *the Church feels in duty bound to speak out with the same courage on behalf of those who have no voice. Hers is always the evangelical cry in defense of the world's poor, those who are threatened and despised and whose human rights are violated.*
>
> Today there exists a great multitude of weak and defenseless human beings, unborn children in particular, whose fundamental right to life is being trampled upon. If, at the end of the last century, the Church could not be silent about the injustices of those times, *still less can she be silent today*, when the social injustices of the past, unfortunately not yet overcome, are being compounded in many regions of the world by still more grievous forms of injustice and oppression, even if these are being presented as elements of progress in view of a new world order.

Evangelium Vitae, ¶ 5, pp. 4-5 (Leaflet Missal ed., March 25, 1995).

REASONS FOR GRANTING THE WRIT

I. NATURAL LAW, THE UNITED STATES CONSTITUTION AND THE ACCESS ACT[6]

It is an undeniable truth, manifest to everyone on reflection, that human law and human government have inherent limits to their competence and authority and that judicial obedience to them can never be absolute. To suppose otherwise is to fall at once into absurdities. For it is to suppose that government should be obeyed even if it commands some heinous crime, as say genocide, or that government remains legitimate and just even if it turns into the worst of tyrannies.

But were this truth not manifest of itself to everyone, it ought nevertheless to be manifest to American judges. For the United States of America was born in a revolution against an existing government, and was founded on the idea that people have a natural right to alter or abolish a tyrannical government and to set up, by their own authority, a non-tyrannical government in its place. The enunciation of this right by the Founding Fathers in the *American Declaration of Independence* is justly celebrated every year by Americans on the occasion of its anniversary. But if there is thus, as the *Declaration* says, a natural right, possessed by the people, to alter or abolish a government when it becomes unjust and tyrannical, then there must also be, correlative to the right, a natural limit to the authority and competence of government and to the obedience that the judiciary owes it.

Nevertheless it is important to stress that the judicial right to disobey or resist unjust government is not a right

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[6] Point I has been adapted from an argument prepared by Professor Peter Simpson, Petitioners' expert on the Natural Law which was presented in the courts below.

to anarchy. For anarchy is the negation of government and the right in question is not a right to *no* government but a right to *just* government. It is a right, as the *Declaration* says, to replace an unjust government with a just government, and not a right to replace an unjust government with no government at all. It is a right, in other words, that is fundamentally law-abiding in spirit. For it is not a right to be lawless; it is a right to be subject and obedient to law and government, but to just law and just government. That is why the right to oppose an unjust law, though it always exists and cannot be taken away by any human power, must be exercised with great caution and prudence. For since it is a right to replace one law with another (namely an unjust law with a just) it cannot be exercised in such a way as to undermine general obedience to and respect for law. Were it to do that it would undermine itself. The law set up in place of the one it overthrew would be as bad as no law because it would not be respected or obeyed. The Founding Fathers knew this truth and took great care not to undermine respect for the law, the law the States had had as colonies, even as they rebelled against the power from which that law had derived its authority. One may, in this regard, suitably contrast the course and result of the law-abiding American Revolution with the course and result of the ultimately lawless French Revolution. The first proceeded throughout without anarchy and ended in a form of government that has endured for over two hundred years. The second swiftly degenerated into a Reign of Terror and ended in the military dictatorship of Napoleon.

We may say, therefore, that as obedience to government and law is limited, so also is the right to resist government and law. In fact both are limited in the same

way and by the same thing, namely by the proper end and goal of government itself. For the right to resistance is, as above remarked, a right to just government and not to no government. It may only be exercised when government and law become corrupt and only for the sake of setting up a government and law that are not corrupt or of resisting and correcting an unjust law. But since government and law are only incorrupt when they are in accordance with the proper end of government, *the right to resist necessarily has the same end as government* and is limited in the same way.

The end of government is human beings and the good of human beings. For governments exist and are set up for the sake of enabling human beings to realize the full range of human goods, the goods whereby and wherein they flourish and reach perfection. These goods are the goods that constitute, and are specified in, the first principles of natural law, namely the goods of life, family, community, and knowledge. They are described in the *American Declaration of Independence* as unalienable rights, the rights of life, liberty and the pursuit of happiness, and they are described in the *Constitution of the United States* as the blessings of liberty. For, clearly, happiness cannot be found save in and through the pursuit of the full range of human goods, and the blessings of liberty can be no other than those same goods understood as the objects of each one's free pursuit.

The two fundamental documents of the American Founding, therefore, the document of the American Revolution and the document of the United States Constitution, rest upon and appeal to the first principles of natural law. Without that appeal they would lack both coherence and justification. For neither document would make any sense if there were no such thing as good and

bad government, and therefore if there were no natural law to spell out the difference by spelling out the proper end of government. Likewise neither document would have any justification if the Revolution was not itself an attempt at securing, and the Constitution not itself an instance of realizing, a government that was good precisely because it answered to the demands of natural law in a way that the one overthrown did not.

The Constitution is, by its own express statement, the supreme law of the United States. But then this at once entails, in the light of what has just been said, that the natural law is the supreme law of the United States. For the Constitution itself presupposes the natural law and is, again by its own statement, aimed at realizing the natural law. For it is aimed at securing the blessings of liberty, which blessings are the goods specified by the natural law. The Constitution is thus, properly considered, an exercise in and of the natural law. The natural law cannot, therefore, be said to be outside the Constitution and the law as if it were something *extra*-legal. On the contrary it must be said to be something that is altogether *intra*-legal, for it is the very stuff of the Constitution and the law; it is what the Constitution and the law are about.

To deny this is, as already indicated, to fall into incoherence. Indeed it is to make a mockery of the Constitution by denying the Constitution's own legality. The Constitution is only the supreme law of the United States because it has been ratified as such by the people of the United States. But the people of the United States had no right to ratify any constitution unless the people of the United States had the right to throw off the government of the British Crown and set up another government in its place. Had they no such right, this act of overthrowing one government and setting up another would itself have

been illegal. It would have been an act of disobedience, of treasonable disobedience, to government and positive law, namely the government and positive law of the British Crown. Indeed had the people no such right, the law of the United States ought still to this day to be the law of the British Crown and the Constitution ought to be cast aside as an illegal document, null and of no effect. In short, the Constitution of the United States can itself only be a legal document if it presupposes and subsumes, as an integral part of itself, the principles of natural law upon which the American Revolution expressly relied, those same principles that the *Declaration of Independence* appealed to when it asserted and vindicated the right of the people to set up another government, and that the United States Constitution itself also appeals to when it speaks even today of its aim as the blessings of liberty.

One significant implication of the fact that the United States Constitution subsumes the natural law within itself, or of the fact that, in the United States, what is contrary to fundamental principles of natural law is contrary also to the whole Constitution[7] – an implication which makes of the Constitution a document deserving of much admiration – is that the Constitution thus subsumes within itself the instruments of its own correction. For the principles of the natural law are, for all law and all government, these instruments of correction. Consequently the Constitution has the ability to strike down as unconstitutional even its own elements if any of them should prove to be contrary to the first principles of

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[7] This Court would agree to the extent that it defended and implicitly expanded the use of substantive due process in 1992. See *Planned Parenthood v. Casey, supra*, 112 S.Ct. 2791, 2805-2807 (negating any set limits to substantive due process).

natural law or if any should be interpreted in a way that is contrary to those natural law principles. It can, in other words, correct by virtue of its first and fundamental principles any of its secondary or derivative clauses that may appear to be, but are not, in accordance with those principles. The Constitution is thus a sort of permanent education and reminder, to judges and people alike, that, in order to be true to their calling as Americans, they must be true first and foremost to those rights and principles of natural law from which the idea of America was expressly drawn and on which the law of America was expressly built.

It is in this sense that the Constitution is to be looked upon, in that much used and much abused phrase, as "a living document".[8] For as a living thing has within itself an active principle of healthy growth and of cure and repair when it is assailed by illness or injury, so also does the Constitution. The natural law within it is that active principle, which is fitted both to move the Constitution (and the laws dependent thereon) towards a more perfect realization of human goods, and also to correct and remove provisions or interpretations inimical to those goods.

But of course this principle of natural law within the Constitution is only active, and will only have these effects, to the extent that it becomes active in the hearts and minds of Americans and above all in the hearts and minds of those Americans who, as members of the judiciary, are specially charged with the care of American law. On them the duty to know and apply the natural law falls in triple fashion. Not only are they beholden to it as

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[8] See William Rehnquist, "The Notion of a Living Constitution", 54 Tex. L. Rev. 693 (1976).

human beings (for the fundamental principles of natural law are the teaching of human nature); not only are they beholden to it as Americans (for the fundamental principles of natural law are the teaching of the United States Constitution); they are also beholden to it as judges (for by swearing a special oath, proper to their office, to uphold the United States Constitution, they have sworn a special oath to uphold the first principles of the natural law that the United States Constitution teaches). On them most of all and primarily, therefore, falls the duty to correct American law so that, insofar as in them lies, any departure from or conflict with the first principles of natural law, as ratified in the United States Constitution of 1790, is removed.

Now first among human goods, and indeed first among the unalienable rights listed in the *Declaration of Independence*, is life itself. For without life no other good can be pursued or enjoyed. This life is, moreover, the equal right of all men by virtue of their creation as men, as the *Declaration*[9] also declares. Simply to be human, in other words, is to have this unalienable right to this good. But it is now well known that humans begin at "conception"[10] in the womb. "Conception" is when a human being is "created" and therefore when he has the right to life. Any American law, therefore, that is interpreted to permit or protect the direct taking of such life within the womb is contrary to the fundamental principles of the

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[9] The United States Constitution's literal text, while it does not repeat the Declaration's reasoning, cannot be supposed to represent a departure therefrom, given the ratification of the Constitution and the Bill of Rights by the people in 1790.

[10] The word "conception" as used in this Argument should be read to include the current (and changing) scientific concepts of conception and fertilization.

whole of the United States Constitution, as it is also contrary to the first principles of natural law.

II. THE TERM "PERSON" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS INCLUDES ALL HUMAN BEINGS.[11]

The Fifth Amendment to the Constitution of the United States provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law". U.S. Const. amend. V. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". *Id.* amend. XIV, § 1. These amendments secure protection for the basic, minimum human rights any government must respect. It is imperative that categories of human beings not be read out of the terms of these amendments.

The Constitution is not a legislative code designed to specify its application in every conceivable situation. "We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines". *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 532 (1870). Thus, the vitality of constitutional principles depends upon their straightforward and faithful application.

If there were ever a term whose broad scope demands unconditional respect, it is the term "person".

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[11] Point II has been adapted from the Brief *Amicus Curiae* filed by Catholics United for Life and other *amici* in *Planned Parenthood v. Casey, supra*, by Thomas Patrick Monaghan, Jay Alan Sekulow and Walter M. Weber as counsel of record and was presented in the courts below.

For whoever is not a person lacks not only the privileges of citizenship, but even the barest minimum of human rights. A person need not have every right – prisoners, minors, and aliens, for example, do not possess the full panoply of rights and privileges afforded under the Constitution – but a non-person has no rights whatsoever. A non-person is no better off than property, entirely subject to the whim of the owner and whatever permissible regulation the government may deign to impose.

The constitutional protection for "persons" simply cannot function if each individual or class of human beings must prove explicit inclusion in some unwritten catalogue of "persons". Does the term "person" include mentally disabled individuals? There is not likely much, if any, explicit support for that particular proposition in the text, history, or early application of the Fifth and Fourteenth amendments. Yet these are certainly persons. *E.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (discrimination against mentally retarded persons triggers equal protection scrutiny). Does "person" include citizens of hostile nations? Children under the age of eighteen? Convicted misdemeanants or felons? Comatose individuals? Each of these classes of human beings lacks either legal or physical ability to exercise certain rights, yet each is unquestionably a class of persons. This is so, not because members of each class can prove their particular inclusion under the fifth and fourteenth amendments, but because they are included *by virtue of their humanity*:[12] "They are humans, live, and

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[12] The importance of this fundamental point cannot be stressed enough:

> The idea of human rights is based upon the notion that certain rights obtain *by virtue of being human and*

have their being". *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing illegitimate children). Therefore, "[t]hey are clearly 'persons' " within the meaning of the Constitution. *Id.*

Human offspring conceived but not yet born are likewise "humans, live, and have their being". They are "a form of human life", *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion), as are infants, toddlers, teens, adults, and the elderly. As human beings, prenatal children should not need to overcome any additional hurdles in order to establish their right to inclusion within the term "person" as used in the Constitution.[13]

> *may be conditioned upon no other requirement.* An attempt to restrict entitlement to those rights by the creation of criteria other than mere humanness is incompatible with the idea of "human rights". . . .

Gorby, *The "Right to an Abortion, the Scope of Fourteenth Amendment "Personhood", and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1, 10 n.58 (emphasis added).

[13] As the Supreme Judicial Court of Massachusetts explained in a different context,

> In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being". An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb. . . . By the use of the term [] "person" . . . the Legislature has given no hint of a contemplated distinction between pre-born and born human beings.

Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324, 1325 (1984) (construing vehicular homicide statute).

III. A JUDGE CAN PROPERLY USE NATURAL LAW TO RULE THAT A STATUTE, OR EVEN PART OF THE CONSTITUTION ITSELF, IS UNJUST AND VOID.[14]

Justice Harlan said it is the "highest duty" of the Supreme Court to "protect" the "constitutional structure".[15] But the constitutional structure, as argued above, rests on the natural law, since the Constitution incorporates the natural law as its foundation. Hence to protect the constitutional structure is necessarily to protect or uphold the natural law. Accordingly if a federal or state statute is contrary to natural law it will also be contrary to the Constitution. The right response, therefore, to a proposal to authorize, for instance, the intentional killing of innocent human beings would be to say that it is not only unjust but also in conflict with the opening words of the Constitution and a violation of the Fifth and Fourteenth Amendments (which make explicit the implications of those opening words). *Roe v. Wade*, however, has been understood to establish such a right to kill as a constitutional right. If the Supreme Court is correct in its assertion that its decisions are the supreme law of the land,[16] the issue becomes whether its decision in the case of *Roe v. Wade* is subject to the higher law of the Constitution's own foundation. The answer would have to be yes.

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[14] Point III has been adapted from the text of Question 17 from the book entitled *50 Questions on the Natural Law* (Ignatius Press, San Francisco, 1995) by Professor Charles Rice of Notre Dame School of Law, at p. 97 and was presented in the courts below.

[15] *See*, for example, *Griswold v. Conn*, 381 U.S. 479 (1965) (right to privacy); *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion).

[16] *Cooper v. Aaron*, 358 U.S. I (1958).

Or again, if a constitutional amendment were adopted to authorize such killing or to require the confiscation without trial or compensation of the property of members of a particular race or religion or to reinstate slavery, would that constitutional amendment be valid? The natural law, and so also a proper interpretation of the Constitution, would require the response to be negative.

The Constitution and the state constitutions incorporate the principles of natural law so that laws contrary to those principles can be shown to violate the Constitution. As the New York Court of Appeals said in *Wynehauer v. People*,[17] which struck down a state prohibition law as applied to existing stocks of liquor, "There is no process of reasoning by which it could be demonstrated that [the law] is void, upon principles and theories outside of the Constitution, which will not also, and by an easier induction, bring it in direct conflict with the Constitution itself". Similarly, in *Fletcher v. Peck*,[18] Chief Justice John Marshall, speaking for the Court, held that a state legislature was forbidden to rescind a previous land grant, "either by general principles, which are common to our free institutions, or by the particular provisions of the Constitution of the United States".

This Court discussed the natural law issue in *Calder v. Bull*,[19] where it held that the prohibition of *ex post facto* laws, in Article I, Section 10, applied only to penal laws and did not protect property rights from retroactive interference. Justice Samuel Chase, in his opinion, stated that if a state legislature did enact a genuinely *ex post facto* law, it would be invalid even if it had not been prohibited

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[17] 13 N.Y. (3 Kern) 378, 392 (1856).

[18] 10 U.S. 6 (Cranch) 87, 139, 3 L. Ed. 162 (1810).

[19] 3 Dall. at 387-89.

by the Constitution of the United States or the constitution of the state:

> I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control although its authority should not be expressly restrained by the Constitution, or fundamental law of the State. . . . There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An *act* of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B.: It is against all reason and justice, for a people to entrust a Legislature with *such* powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a

> political heresy, altogether inadmissible in our free republican governments.[20]

A glaring instance of a failure by the judiciary to recognize and act on the natural law present in the Constitution is the Dred Scott case, in which the Supreme Court held that freed slaves and their free descendants could not be citizens and said that slaves were property rather than persons.[21] Even if the Court there correctly interpreted the technical intent of certain elements of the Constitution, these elements of the Constitution in that respect would be intolerably unjust and contrary to the Constitution as a whole in their attempt to break the inseparable connection that must exist, in any free and just society, between humanity and personhood.

The Constitution is the highest human law in our land,[22] and it is entitled to be so because it is founded on and incorporates in itself the highest law simply, namely the natural law, and because, as a result, all its elements are subject to that higher law. If a constitutional amendment were adopted to require the disenfranchisement of persons of a certain race or religion, there would seem little doubt that a judge would have the right and the duty to declare the amendment itself unlawful and void. Nevertheless, this responsibility offers no warrant for judges to roam at large over the constitutional landscape, acting as a continuing constitutional convention in disregard of the constitutional text and the evident intent of its

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[20] 3 Dall. at 387-89 (emphasis in original).

[21] *Scott v. Sanford*, 60 U.S. (19 How.) 393 15 L. Ed. 691, 709, 720 (1857).

[22] U.S. Constitution, art. VI, cl. 2.

framers.[23] For it is the constitutional text and the intent of the framers that give judges the responsibility in question. In consequence only rarely would a judge be entitled or obliged to appeal back to the higher law principles to refuse to uphold or enforce an enacted law. As the German courts indicated after World War II, judges should take this step only when the conflict between the law or precedent and justice is "intolerable" or "unendurable".[24] Such a conflict could occur with respect to *Roe v. Wade*, because that ruling has been understood to authorize the execution of a certainly innocent human being. However, as will now be shown in Point IV, one need not reach that conflict on *Roe*, because the decision's supposed denial of personhood to unborn human beings would incorrectly interpret the Fourteenth Amendment,[25] as well as the Constitution as a whole.

IV. THE JUDICIAL DEPARTMENT OF THE UNITED STATES HAS THE POWER TO RECOGNIZE THE EXISTENCE OF HUMAN LIFE BEFORE BIRTH[26]

Given what has been said in Points I, II and III, a critical question arises. Does any department of government have the power to recognize and protect human life before birth?

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[23] *See* Berger, *Government by Judiciary*, 2.

[24] *See* Question 2 in Rice, *50 Questions*, *supra*, note 14.

[25] *See* Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion", 41 *Fordham* L. Rev. 870 (1973); Randall Hekman, "Judging: By What Standard?" 4 *Christian Leg. Loc.* Q. 19 (1983); Charles E. Rice, "Some Reasons for a Restoration of Natural Law Jurisprudence", 24 *Wake Forest* L. Rev. 539-68 (1989).

[26] This Point was presented in the courts below.

The answer is both simple and obvious. The judicial branch, which now restrains the legislatures under *Roe v. Wade, supra,* and *Planned Parenthood v. Casey, supra,* retains the power to act, as held by the majority in *Casey* in Part III of the opinion of the Court. Indeed, the judicial branch not only retains that power but has been effectively invited to use it by the very words of *Roe* itself. For in his decision Justice Blackmun wrote: "The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment . . . *If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment*".[27] But the facts proving the personhood of the unborn, if they could be doubted before, cannot be doubted now, and the judicial branch certainly possesses the power to recognize those facts. Consequently the judicial branch certainly has the power to make a finding to the effect that the unborn are persons, and so has the power to apply *Roe* against itself and against its current interpretation, and thus bring it back into line with the Constitution and thereby with the principles of natural law.

One may usefully note, in this regard, that a scholarly judge of the New Jersey Superior Court, the Honorable Reginald Stanton, has provided a beacon to judges everywhere on the question of when human life begins in his opinion in *State v. Loce,*[28] 630 A.2d 843, 845 (N.J. Super. L., 1991), *aff'd,* 630 A.2d 792 (App. Div. 1993):

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[27] *Roe v. Wade, supra,* 410 U.S. 113 at 156-157 (emphasis added).

[28] Brother Fidelis Moscinski, one of the Petitioners in the case at bar, was also a defendant in *State v. Loce.*

I am sure that defendants and their counsel have anticipated all along that a trial judge would be constrained to reach the legal conclusions which I have reached in this case. I believe that the real thrust of their proofs and their arguments has been directed at the appellate courts which may eventually hear this case rather than at the trial judge. They would hope to have me as a trial judge make findings of fact which they might later use as a base for moral and legal arguments before appellate courts. Ultimately, they would like to persuade the United States Supreme Court to overrule *Roe v. Wade*.

The particular finding of fact which defendants urge me to make is that a fetus is a human being from the moment at which the sperm and the egg unite. The testimony of Dr. LeJeune, of Dr. Nathanson and of Dr. Hittinger is all directed (from varying disciplines and viewpoints) towards that end. I do not regard the question of when human life begins (or the related question of when the fetus becomes a person) as a religious issue, or an abstractly scientific issue, or a remote philosophical issue which is beyond the ken of lawyers and judges. It is an issue of practical legal impact. Lawyers, judges, legislators and public policy makers have the right, and probably the duty, to address this issue. But they must address it in the right context, with caution, with the right sense of respect, with appropriate humility, and in circumstances likely to produce comprehensive data and rigorous analysis. Under the appropriate conditions, I, for one, would be willing to attempt to make a judicial finding of fact on this issue. (630 A.2d at 845).

The power, then, to act and find for the life and personhood of the unborn lies certainly and perhaps now solely with the judicial branch. On that branch, therefore, it lies to face this issue squarely and not to abandon its most sacred duty and privilege, the duty and privilege of upholding the unalienable rights, and of defending the blessings of liberty, for all persons within the jurisdiction of the United States. So since it is specifically this Court that is now being called upon to fulfill this sacred duty and privilege, it is this Court that, in the case at bar, must now exercise this power to act.

Once the fact of actual human existence in the womb gestation is found, personhood and constitutional protection must follow (see Points I, II and III, *supra*), notwithstanding any *other* interpretations of *Roe* and *Casey*.

Properly interpreted, the majorities in *Roe* (7-2) and *Casey* (5-4) do not *admit* or *permit* the taking of innocent human life. Nor do they *admit* or *permit* the withdrawal of Fourteenth Amendment protection from any human being. Both cases clearly stand for the proposition that *actual* human life and personhood are the same under the Fourteenth Amendment.

CONCLUSION

Petitioners acted upon the knowledge that human life was being taken in the Dobbs Ferry clinic. Their faith called them to witness that act and to pray for the conversion of those who participated in it. Their religious duties as a Roman Catholic Bishop and a religious brother required them to do everything they could to call the seriousness of abortion to the attention of its actual participants on May 13, 1995 and August 24, 1996. No other

alternatives, such as legislative efforts or court action, could have protected the pre-born children facing imminent death at that clinic on those two mornings. Nor have such alternative non-protest efforts succeeded during the past 30 years, from a time when abortion was first legalized. During that time period more than 36 million children have lost their lives to the violent act of abortion. (A32.)

When faced with such heartbreaking statistics, the Court should take cognizance of the even-tempered nature of the defendants' conduct. Praying the Rosary, the defendants asked only that grace be bestowed on those entering the clinic so that they might immediately change their minds and respect life to its fullest extent. The defendants relied for the most part solely on the power of that prayer. By praying in the clinic driveway, the defendants risked State arrest, yet this sacrifice on their part was needed to bring the seriousness of abortion to the attention of its participants in a very real and present-moment way. Bishop Lynch and Brother Fidelis acted consistent with their faith and calling. "[J]ust as Our Lady of Guadalupe brought an end to the Aztec human sacrifice, [the Petitioners] were hoping that, through her prayers and intercession, she could bring about the same end of the sacrifice" on that August day. Tr. 10/15/96 at p. 29, lines 7-12.

The Court below *expressly declined* to address Petitioners' only defense, *viz.*, that human life actually exists prior to birth, that Women's Medical Pavilion in Dobbs Ferry, New York admittedly performs abortions at 24 weeks (6 months) gestation, and that 18 U.S.C. 248, to the extent that it protects the taking of these innocent human

lives is contrary to Natural Law, and therewith to the Constitution as well, and is null and void.

Under existing precedent, the District Court had the power and the duty to decide meritorious issues presented in defense by the parties to the litigation. *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); *Loan Ass'n v. Topeka*, 87 U.S. 655 (1874).

Accordingly, this Court should grant certiorari and summarily remand the case to the Court of Appeals and direct that these issues be fully litigated and addressed in the District Court.

Dated: New York, New York

March 1, 1997

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of December, one thousand nine hundred and ninety-six.

PRESENT:

HON. ELLSWORTH A.
VAN GRAAFEILAND,
HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

No. 96-6137

GEORGE LYNCH and
CHRISTOPHER MOSCINSKI,

(Filed
Dec. 11, 1996)

Defendants-Appellants,

APPEARING FOR APPELLEE:	MARTIN J. SIEGEL, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney for the Southern District of New York, James L. Cott, Gideon A. Schor, Assistant United States Attorneys, of counsel).
APPEARING FOR APPELLANT	MICHAEL P. TIERNEY, Legal Center for Defense of Life, New York, NY (A. Lawrence Washburn, Jr., Cornelius Cawley, of Counsel).

This cause came on to be heard on the transcript of record from the United States District court for the Southern District of New York (Sprizzo, *J.*), and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is **AFFIRMED.**

Defendants George Lynch and Christopher Moscinski appeal from the February 23, 1996 order of the United States District court for the Southern District of New York (Sprizzo, *J.*), permanently enjoining them from violating in any way the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, including but not limited to violations by impeding or obstructing ingress to or egress from the Women's Medical Pavilion ("WMP") in Dobbs Ferry, New York. Defendants contend on appeal that the district court should have entertained and accepted a defense to the injunction based upon natural law. For the

reasons set forth below, we find defendants' contentions on appeal to be without merit.

The complaint, filed on October 27, 1995, alleged that defendants violated FACE by blocking access to the WMP on May 13, 1995. On November 3, 1995, the Government moved for a preliminary injunction prohibiting defendants from impeding ingress to or egress from the WMP and/or from coming within fifteen feet of the clinic's property. After consolidating the preliminary injunction application with trial on the merits, the district court conducted a hearing on December 12, 1995. At the close of the hearing, the court reserved decision and ordered briefing as to FACE's validity under the Commerce Clause. On February 21, 1996, the district court upheld FACE under the Commerce Clause, and found that the defendants had violated the statute by making entry to the WMP unreasonably difficult. The court therefore granted the Government's application for a permanent injunction; the injunction order was entered on February 28, 1996. On March 11, 1996, defendants moved to amend the order under Rule 59(e) of the Federal Rules of Civil Procedure on the ground that the court's opinion had failed to address expressly their natural law argument. The district court denied this motion on April 17, 1996, and defendants filed a notice of appeal on May 8, 1996.

The FACE statute provides for civil and criminal penalties against anyone who:

> by force or threat or force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such

> person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. § 248(a)(1). The statute provides for civil enforcement by the Attorney General of the United States, and authorizes courts to "award appropriate relief, including temporary, preliminary or permanent injunctive relief," to remedy statutory violations. *Id.* § 248(c)(2).

Defendants concede that they willfully intended to impede and did impede access to the WMP on May 13, 1995. At the December 12, 1995 hearing, defendants essentially offered no challenge to the Government's evidence, nor did they present any evidence of their own. Their only defense was their contention, which they argued at length, that the FACE statute protects the taking of innocent human life, and is therefore contrary to natural law and accordingly null and void.

Defendants' sole contention on appeal is that the district court declined to address their only defense based on natural law. We find it abundantly clear from the record that the district court considered and rejected this defense. Judge Sprizzo stated that, "I don't recognize my authority to refuse to issue an injunction under natural law," and "I don't have the right to act my own private conscience." He pointedly explained to defense counsel:

> That seal above my head says . . . this is Caesar's court. This is not a church, this is not a temple, this is not a mosque. And we don't live in a theocracy. This is a court of law. I will look at all the legal issues.

Thus did the district court fully and forcefully address and deny defendants' natural law defense.

We agree with the district court's conclusion that natural law cannot furnish a valid basis upon which to nullify the FACE statute, or the injunction issued pursuant to it. Defendants cite, among others, Pope John Paul II's encyclical, *Evangelium Vitae*, Thomas Aquinas' *Summa Theologia*, and Ronald Dworkin's *Taking Rights Seriously*. For better or worse, as the case may be, these texts do not control our decision in this case: "the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people." *Testa v. Katt*, 330 U.S. 386, 391 (1946). Defendants do not argue that FACE is unconstitutional. They argue instead that FACE (and abortion) are anathema, and thus violate principles superior to the Constitution. Under Supreme Court precedent, well-settled constitutional principles, and the rule of *stare decisis*, we decline to invalidate a federal statute (on its face or as applied) on the basis of natural law principles.

We have considered all of defendants' contentions on this appeal and have found them to be without merit. The judgment of the district court is AFFIRMED.

/s/ Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND, U.S.C.J.

/s/ Dennis Jacobs
DENNIS JACOBS, U.S.C.J.

/s/ Guido Calabresi
GUIDO CALABRESI, U.S.C.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

95 Civ. 9223 (JES)

GEORGE LYNCH and
CHRISTOPHER MOSCINSKI,

Defendants.

---------- x

New York, N.Y.
February 21, 1996
11:30 a.m.

Before:

HON. JOHN E. SPRIZZO,

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the Southern District of New York
BY: MARTIN J. SIEGEL
Assistant United States Attorney

LAWRENCE WASHBURN, JR.
ROBERT WINNEMORE,
Attorneys for Defendants

* * *

To the extent that the government is predicating their argument on the ground that Congress had the power to pass the statute pursuant to the Civil Rights Amendment, I am not willing to accept that argument. I read the legislative history, I read their reliance upon *Katz*, which is a 1966 case. I point out for the record that, under *Roe v. Wade* and under *Casey*, the right to have an abortion has a very limited and very flexible protection. *Casey* makes it very clear that there is no absolute right to an abortion, and even *Roe v. Wade* made it equally clear that, except within the first trimester, there is no right to an abortion. That right, by the way, under both of those cases, has only been held to be protected against state interference. It is not clear to me that the right to an abortion is a federally created right which is protectable against private citizens. I know the arguments. They are referred to in the legislative history.

There is some serious question as to whether or not clause 5 justifies this type of statute. The reason why I am unwilling to accept the argument is that I think it is very clear, even if the *Katz* case is good law in view of *Adarand* – *Katz* was a case that was decided in 1966 – that the 14th, 15th, and 19th Amendments were designed specifically to ameliorate the effects of slavery. It was a literacy test requirement in which that type of conduct was clearly the issue. In that context they sustained the government's power in the *Katz* case, which is referred to in the legislative history.

The law has changed since, even in the civil rights area. *Fullilove* has been, for all practical purposes, overruled by *Adarand*, so there is a serious constitutional question right now as to whether the federal government has any greater power to pass race-based or gender-based legislation than the state courts had since *Croson* was decided. The issue of the power of the federal government to enact legislation, even in the race area, where I would think that the Civil Rights Amendment gives the federal government the greatest power to enact legislation, is at least questionable.

The other reason why I will not accept the government's argument that the 14th and 15th Amendments justify the statute constitutionally insofar as it is directed against private citizens is, as I have indicated, that it goes too far.

I might point out, as I have already pointed out, that the liberty interest protected in *Roe v. Wade* against state interference is a much more limited liberty interest than other interests we have, such as the right to life, the right to property, etc., which for the most part is protected much more broadly under our constitutional scheme than the right to an abortion. The right to an abortion is a fairly recently defined liberty interest and, as *Casey* indicates, the parameters of it are far from clear.

If I were to accept the government's argument that there was a constitutional liberty interest, where would we draw the line? A citizen has a liberty interest against being murdered, being raped, being killed, being shot, being robbed, being burglarized, being mugged. There are all kinds of liberty interests and property interests

concerning which the government can then justify federal legislation which would, in effect, supersede entirely the police powers of the states and turn the government, which was established by the Constitution, on its head and make the 10th Amendment virtually a dead letter.

So I am unwilling to accept the government's argument because I don't see any principled basis upon which to limit the power of the federal government, once we went down the treacherous road of saying that the federal government has the power to enact legislation to protect "liberty interests" and that that power is virtually unlimited. I can think of no principled basis upon which to limit it. I can see no reason why Congress could not make local murder a federal crime, or local robbery a federal crime, or rape a federal crime, and that does seem to run afoul of some of the thinking that was set forth in *Lopez*.

The other basis for constitutional justification offered for this statute is the Commerce Clause. We all know that we are living at a time when the Commerce Clause jurisprudence is, to say the least, in flux. I have read the *Lopez* case very carefully – all opinions. I must say there is a lot of logic to commend some of the things in those opinions, but Justice Thomas's decision, I think, which is most logical and perhaps more consistent, raises a serious question as to whether the New Deal interpretation of the Commerce Clause is the true one or whether *Lopez* is the true one. That is not an argument which I can get into at this point, nor need I. I think Justice Thomas is quite correct in suggesting that if the Commerce Clause was as broad as the dissents in that case suggest, there would be no need for any other enumerated powers in the Constitution, because under that argument everything would

affect commerce and therefore why have any other enumerated powers? There is a certain logic to that position. As the *Lopez* case points out, there is no principled basis upon which you can draw the line between what is and what is not within the commerce power, once you accept the notion that anything that has an effect upon commerce is automatically justified under the Commerce Clause.

However, we do have some Congressional findings here which indicate a high degree of interstate travel and which do indicate at least a kind of connection with interstate commerce which was substantial enough to justify the Supreme Court's decision in the *Heart of Atlanta Motel* case. Given the prior jurisprudence that exists in this area, given the fact that none of that jurisprudence has been overruled, given the fact that *Lopez* is one case and we don't know which way the law is going to go, and given the circumstance that I am sitting at the lowest rung of the federal court ladder, I don't think it is in my power to overrule or anticipate the reversal of Supreme Court precedents.

I will say for the record that *Lopez* is factually distinguishable, in the sense that it is hard to argue how the sale of narcotics within a thousand feet of a school even had a minimal effect upon interstate commerce.

By the way, *Lopez* indicates that the Congressional findings are not dispositive. Merely because Congress makes findings does not mean that the statute is necessarily within the Commerce Clause. Congress does not have the power to create its own constitutional power by making findings. But there is enough in those findings to

at least persuade me that the blockade of abortion clinics, etc., and the kind of conduct which is referred to in the legislative history have a high likelihood of affecting commerce in a more substantial way than the conduct which was at issue in *Lopez*. Therefore, I am not convinced that the Supreme Court would find that this statute exceeds Congress's power or the commerce power.

Also, I am not sure of what the Supreme Court will do with the Commerce Clause in the future. But, based upon the law as it exists now, and the factual distinctions which I think exist between this case and *Lopez* – because I think the impact upon commerce, especially in view of the Congressional findings, is more substantial than that which was at issue in *Lopez* – I do not think I can find the statute to be in excess of Congress's power under the Commerce Clause.

I indicated the last time we were here that there were some First Amendment problems. I have already indicated during the course of the argument that I do think that the government's position with respect to the argument that it is conduct, not speech, and that therefore there are no First Amendment problems, is a bit simplistic. I think, as I have indicated, Senator Hatch's comments are worthy of some serious consideration. This statute does for the first time punish passive disobedience. While conduct is not speech, passive disobedience has had such a long and honored connection with speech in this country that Congress's attempt to reach it does raise some constitutional issues.

I also think there is some strong support in what Senator Hatch says that the Congressional findings in this case may betray a lack of neutrality on this issue.

Although the statute in its terms seems to be neutral, there are certain aspects of the statute which are truly disturbing, in the sense that they may not be viewpoint neutral. I think that the Orwellian technique of describing pregnancy and birth as a kind of abortion-related service tends to indicate that Congress had abortion at the center of its mind. They dealt with some of the objections of the minority by saying that we will include pro-life services too, because we will define them as abortion-related services. I think it is truly Orwellian to suggest that birth is an abortion-related service rather than abortion being a birth- or pregnancy-related service. So I think that Congress's bias in this area may manifest itself in that kind of thinking.

Also, I think there is some merit to what Senator Hatch says when he says that it is not all that clear that the statute reaches similar conduct directed against pro-life protesters, and that the statue's failure to do that is some indication of bias. As Senator Hatch points out in his minority report, there was ample testimony which did not find its way into the majority findings which dealt with violent protests and/or conduct directed against pro-life protesters, which it seems to me, if Congress had been truly neutral, they would have dealt with. The answer they gave Senator Hatch was: We have. It is not exactly that clear that they have. I am a little disturbed about a statute which appears to be viewpoint neutral on its face, but is somewhat more than that or somewhat less than that, depending upon how you approach the situation. That does make me a little bit uneasy in terms of the First Amendment considerations that I am concerned about.

I do not accept the government's argument that *Mitchell* is dispositive, i.e., that the hate crime cases are dispositive, for the reasons I have already given. Congress has, up to this point in time, confined its legislation to conduct which involves violence or threats of violence. This statute does reach passive disobedience, and I think that does make a difference. However, as I have already indicated, these constitutional issues would concern me a lot more were not the Court vested with the broad discretion to tailor the remedy to the conduct.

I think that I have already found for the record that I do not find that the defendants' conduct on the facts of this case – and that is a fact finding – rendered the driveway impassable. However, the context of the words "unreasonably difficult" is a little more elastic. While the word "unreasonable" may not be constitutionally vague, it is certainly a term that has some flexibility, and the precise parameters of what conduct it reaches are not entirely clear.

Given the fact that the defendants in this case have not seen fit to defend this charge and have not seen fit to challenge the government's evidence in any way, the Court does find persuasive the circumstance that parking was tight in this area and that some people were delayed up to a half an hour or forty minutes to get to the clinic, and other people may have been unable to attend altogether. On the whole, looking at all of the evidence in a reasonable way, I find under the facts of this case, by a preponderance of the evidence, which is all I think I am required to do at this stage of the case – it is not a reasonable doubt standard, I assume – that they did by their conduct make it unreasonably difficult to get into

this driveway, given the local conditions that existed and the lack of parking in the area. The finding might have been different had parking been more easily obtainable. But that issue is not disputed and I will accept it as established. Therefore, I find that they have violated the statute by making passage to the driveway unreasonably difficult.

I don't think there is any dispute here that they did it with the requisite intent. The Court concludes, therefore, that since Congress has incorporated into the statute three provisions which I think obviate any constitutional difficulties – one provision giving the Court what amounts to virtually unlimited discretion to fix the sentence for a violation of the Court's order, a second provision to assess statutory damages, and a third the admonition that the statute be construed in such fashion as not to reach protected conduct – I do not find the statute to be an unconstitutional exercise of the Congress's power.

As the government has suggested in its brief, and I think quite correctly, the issue of constitutionality as applied will be reached more precisely and more sharply if and when there is a violation of the Court's order and the Court is being asked to fix an appropriate penalty. At that point I think the issue will have to be addressed again.

The long and short of my decision is that the government's application for an injunction is granted, in form which tracks the form of the TRO. Don't give me anything more than is in the TRO. I do not want it and I will not sign it. I am enjoining just this conduct and no other.

Your application for statutory damages is denied without prejudice to being renewed if and when there is a violation of the Court's order. Submit an order and I will sign it.

MR. SEIGEL: Thank you, your Honor.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

GEORGE LYNCH AND CHRISTOPHER MOSCINSKI,

Defendants.

---------- X

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MEMORANDUM OPINION AND ORDER

SPRIZZO, D.J.:

The Government brings the above-captioned criminal contempt proceeding against defendants George Lynch and Christopher Moscinski. For the reasons that follow, the Court finds defendants not guilty.

BACKGROUND

The following facts, as set forth in a stipulation signed by the parties, are undisputed. *See* Stipulation ("Stip.") (undated) attached to Government's Letter brief dated November 5, 1996, and submitted to the Court at the Trial held on October 15, 1996.

On February 23, 1996, the Court entered a permanent injunction in *United States v. Lynch and Moscinski*, 95 Civ. 9223 (JES), which provided:

> IT IS HEREBY ORDERED that defendants George Lynch and Christopher Moscinski, their agents, and all individuals acting in concert

> with defendants or their agents, are permanently enjoined from violating, or aiding and abetting the violation of, the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248, in any way, including but not being limited to:
>
> 1. impeding or obstructing automotive or any other form of ingress into, or egress from, the Women's Medical Pavilion in Dobbs Ferry, New York; and
>
> 2. attempting to take – in inducing, encouraging, directing, aiding, or abetting in any manner others to take – any of the actions set forth in subparagraph 1 of this order.

Order Imposing Permanent Injunction dated February 23, 1996.

On August 24, 1996, at approximately 7:30 a.m., officers from the Dobbs Ferry Police Department were called to the Women's Medical Pavilion (the "Clinic") in Dobbs Ferry, New York, where Lynch and Moscinski were seated in the Clinic's driveway. Stip. at 2. At approximately 7:50 a.m., after observing several vehicles unsuccessfully attempt to enter the parking lot, officers warned Lynch and Moscinski that they were violating the law, and that if they did not leave the area immediately, they would be arrested. *Id.* Lynch and Moscinski acknowledged the warning and remained seated. *Id.* The officers then arrested Lynch and Moscinski, who upon being arrested, went "limp" and were carried to a bus for transport to the police station. *Id.*

Lynch and Moscinski acknowledged that at the time they sat in the Clinic's driveway they knew of the Court's

injunction, and knew that they were enjoined from " 'impeding or obstructing automotive or any other form of ingress into, or egress from, the [Clinic].' " Stip. at 2.

On September 6, 1996, the Government charged Lynch and Moscinski with contempt of the Court's February 23, 1996 Order Imposing Permanent Injunction. *See* Notice of Charge.

On October 15, 1996, the Court held a trial and heard testimony from Lynch and Moscinski. The Court also viewed and received into evidence a video-tape recording of defendants' actions at the Clinic the morning of the incident.[1]

DISCUSSION

Because the parties agree to the facts as set forth in their stipulation, the Court deems those facts established and incorporates them into its findings.

The Court further finds, and it has not been disputed, that Lynch and Moscinski acted out of a sense of conscience and sincere religious conviction. Any further inquiry into the validity of their beliefs is foreclosed by the First Amendment. *See United States v. Seeger*, 380 U.S.

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[1] On August 24, 1996, George Lynch was held in civil contempt of the Court's Order Imposing Permanent Injunction based on his actions to block ingress to and egress from the Clinic on April 3, 1996. Pursuant to 18 U.S.C. § 248(c)(2)(B), the Government requested statutory damages in the amount of $5,000, which the Court denied. *See* Order Holding Defendant in Civil Contempt and Denying Plaintiff's Request for Statutory Damages dated August 24, 1996.

163, 185 (1965) (in connection with section 6(j) of the Selective Service Laws, the truth of a belief is not open to question, rather, the question is whether the objector's beliefs are truly held) – *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (court may only inquire whether claimant sincerely holds a particular belief and whether that belief is religious in nature); *International Soc'y For Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439 (2d Cir. 1981) (court will investigate adherent's sincerity and will invoke free exercise analysis where belief is asserted and acted upon in good faith).

The Court asked the parties to brief whether it is a defense to a criminal contempt charge that a person act with a sincere religious belief that he is acting to save a human life. The Government, in its letter brief to the Court, cites a variety of cases from other circuit courts holding that abortion protesters, as a matter of law, are not entitled to a necessity defense. *See* Government's Letter brief dated November 5, 1996, citing *interalia*, *United States v. Turner*, 44 F.3d 900, 901-03 (10th Cir.), *cert. denied*, 115 S.Ct. 2250 (1995) (holding, as a matter of law, that necessity defense does not apply to abortion protesters who violate preliminary injunction); *Zal v. Steppe* 968 F.2d 924, 929-30 (9th Cir.), *cert. denied*, 506 U.S. 1021 (1992) (trials court's evidentiary orders excluding necessity, defense of others, and mistake of fact defenses did not violate 6th or 14th Amendments); *Roe v. Operation Rescue*, 919 F.2d 857, 869-70 (3d Cir. 1990) (affirming exclusion of medical evidence regarding fetuses which would have been used to support justification defense in civil contempt charge); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350-52 (3d Cir.), *cert. denied*,

493 U.S. 901 (1989) (affirming exclusion of evidence relating to justification defense to civil RICO and state trespass claims).[2]

There is no authority in this Circuit dealing precisely with this issue. In one state case a court did instruct a jury that the defendants could present and argue New York's justification statute, New York Penal Law § 35.05, so long as the jury found that the medical group at issue was about to perform other than first trimester abortions. *See People v. Archer,* 537 N.Y.S.2d 726 (1988). The court reasoned that a jury is free to decide, under New York's justification statute, whether abortions are immoral " 'injuries to be avoided' " and whether " 'the urgency of avoiding such injuries clearly outweighs the desirability of avoiding injuries such as Trespassing and Resisting arrest,' which the criminal statutes in issue" were designed to prevent. *Id.* at 732. The court further determined that New York's justification statute could not be asserted for conduct directed towards first-trimester abortions because such state regulation would be preempted by *Roe v. Wade,* 410 U.S. 113 (1973). *Id.* at 733-34.

Two other state cases declined to apply New York's justification statute. *See People v. Bauer,* 614 N.Y.S.2d 871, 873 (1994) (finding the defense of justification under

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[2] It should be noted that a necessity defense is not synonymous with a justification defense. The former requires that there be no other means available to avoid committing the offense whereas the latter may require only a well-founded objectively reasonable belief that an act is necessary to preserve human life. *See generally* LaFave, Wayne R. and Austin W. Scott, *Criminal Law Second Edition,* §§ 5.4-5.8 (1986).

Penal Law § 35.05 does not apply in case of defendant who blocked door to doctor's office in attempt to persuade women not to have abortions and who was charged with trespass and resisting arrest); *People v. Crowley*, 538 N.Y.S.2d 146 (1989) (precluding justification or necessity defense for conduct directed towards legal abortions because the injury sought to be prevented has been awarded legal protection by the New York legislature and the United States Supreme Court).

In this case, the record is unclear whether abortions beyond the first-trimester were performed in the Clinic at issue. Since abortions are legal in New York beyond the first trimester, *see* N.Y. Penal Law § 125.05 (McKinney 1987), there is a reasonable inference that the justification defense might be available in New York with respect to late abortions. It is interesting to note that the New York State Senate passed a bill in April, 1996, to ban partial birth abortions. *See* Ken Moritsugu, *NY Senate: Ban Some Abortion But 'Partial-Birth' Law Unlikely*, Newsday, May 1, 1996. Although the Assembly voted to shelve that bill, *see* Shannon McCaffrey, *Close Abortion Vote in Assembly Worries Abortion Rights Advocates*, The Associated Press Political Service, December 19, 1996, if anything, the parameters of the justification defense with respect to this issue may ultimately be enlarged.[3]

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[3] The Court is not persuaded by the Government's argument that there cannot or should not be any defense of justification or necessity merely because the conduct at issue *i.e.* abortion, is legal as a matter of positive law. Were a person to have violated a court order directing the return of a runaway slave when Dred Scott was the law, would a genuinely held belief that a slave was a human person and not an article of

However, the Court need not resolve this issue because the Court finds beyond a reasonable doubt that neither Lynch nor Moscinski acted with the willfulness which criminal contempt requires. *See United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 659 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990) (criminal contempt sanctions may be imposed only if it is proven beyond a reasonable doubt that the contemnor willfully violated the specific and definite terms of a court order); *S.E.C. v. American Bd. of Trade, Inc.*, 830 F.2d 431, 439 (2d Cir. 1987), *cert. denied*, 485 U.S. 938 (1988) (same).

In *United States v. Sisson*, 399 U.S. 267 (1970), the Supreme court addressed a fact situation in which a person who had refused to seek a conscientious-objector classification, also refused to submit to induction and was prosecuted for that offense. The defendant, Sisson, argued in pre-trial motions that the Vietnam War was immoral and that he did not feel he could, in good conscience, claim a conscientious-objector status, because he was not opposed to all wars but just opposed to that

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property be a matter the Court could not consider in deciding whether that person was guilty of a criminal contempt charge. And if so, what moral justification could be offered for trying government officials, including judges, for implementing the positive laws of Nazi Germany.

These considerations are made even more relevant because of recent events in Bosnia and because of present United States commitments to international treaties on human rights, which could conceivably, at some time, put United States positive laws relating to abortion and the judges who implement them at variance with and in violation of a future international consensus on that issue. *See* Minutes to the Second Circuit Judicial Conference, held in June, 1996 (to be published).

war. *Id.* at 271-75. The district court instructed the jury to determine whether Sisson's refusal to submit to induction was " 'unlawfully knowingly and willfully' done." *Id.* at 276.

After the jury found Sisson guilty, the district court set the verdict aside on a motion to arrest judgment, concluding that Sisson's sincere moral belief precluded his conviction for the offense charged. *Id.* at 277-78. The government unsuccessfully sought to appeal the decision on the ground that it was not an acquittal. *Id.* at 279-308. The Supreme Court rejected the government's argument holding that since the district court had gone outside the indictment and considered evidence at trial in concluding that Sisson's sincere moral belief precluded Sisson's conviction, it was in fact a judgment of acquittal that could not be appealed. *Id.*

In this case, the Court finds as a matter of fact that Lynch's and Moscinski's sincere, genuine, objectively based and, indeed, conscience-driven religious belief, precludes a finding of willfulness. Willful conduct, when used in the criminal context, generally means deliberate conduct done with a bad purpose either to disobey or to disregard the law. *See Black's Law Dictionary* (5th ed. 1979). That kind of conduct is not present here.

Although the Second Circuit, in a criminal contempt case involving a defendant who refused to testify as a trial witness after he had been immunized and directed to answer questions, rejected the argument that good faith reliance on advice of counsel negates willfulness, *see United States v. Remini*, 967 F.2d 754, 757 (2d Cir. 1992), the Court is aware of no criminal contempt case where a

court has rejected a sincere religious belief as a defense to a criminal contempt charge. *But see Smilow v. United States*, 465 F.2d 802, 804 (2d Cir.), *vacated*, 409 U.S. 944 (1972) (affirming judgment which rejected religious defense claim in context of civil contempt proceeding, which does not require willfulness); *see also State of New Jersey v. Chesimard*, 555 F.2d 63 (3d Cir. 1977) (en banc) (Gibbons, Maris and Van Dusen, Judges, dissenting) (disagreeing with majority's decision not to reach merits of defendant's request that trial not be held on Fridays, a holy day, and finding that government objective, even of the highest order, will not justify the imposition of restraint upon free exercise of religion unless that objective cannot otherwise be achieved); *United States v. Fisher*, 571 F.Supp. 1236 (S.D.N.Y. 1983) (rejecting co-defendant's First Amendment interest in not having to attend trial on Fridays, a holy day, due to extraordinary circumstances of eight defendant trial of expected lengthy duration).

However, even assuming arguendo that the Court were satisfied that the Government's proof established the requisite willfulness, the Court would still find the defendants not guilty. The facts presented here both by sworn testimony and a videotape depicting an elderly bishop and a young monk quietly praying with rosary beads in the Clinic's driveway, clearly call for what Judge Friendly once referred to, in *United States v. Barash*, 365 F.2d 395, 403 (2d Cir. 1966), as that exercise of the prerogative of leniency which a fact-finder has to refuse to convict a defendant, even if the circumstances would otherwise be sufficient to convict. *But cf. Sparf and Hansen v. United States*, 156 U.S. 51 (1895) (outlawing practice of

permitting counsel to argue to jury that it could return a verdict contrary to law).[4]

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[4] Indeed, that prerogative of leniency has for centuries proven most effective in both England and America in resisting attempts at government oppression, especially in cases involving free expression.

Most illustrative of that experience in American history is the trial of John Peter Zenger in 1735 on charges of seditious libel. Zenger, as editor and printer of the New York Weekly Journal, the first journal of political criticism in New York, criticized the newly appointed royal Governor of New York. William Cosby, for seeking to remove trials by juries at his pleasure. Three grand juries refused to indict Zenger, despite his evident guilt, which ultimately led New York's Attorney General to file an information. At trial, Zenger was defended by Andrew Hamilton of Philadelphia, widely regarded as the foremost lawyer in the colonies. Hamilton conceded that Zenger published the papers at issue, but argued to the jury that truth was a defense, although under the law at that time it was not. The Chief Justice properly instructed the jury as to the law, but it acquitted Zenger. *See* James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (Stanley N. Katz ed., 2d ed., The Belknap Press of Harvard University Press, Cambridge, Massachusetts 1972); Albert W. Alschuler and Andrew G. Deiss, *A Brief History of Criminal Jury in the United States,* 61 U.Chi.L.Rev. 867, 871-75 (1994).

Similarly, in England, the Crown frequently endeavored to suppress political dissent and criticism of the Crown by resort to prosecutions for libel. There too, juries frequently resisted those efforts. *See generally Woodfall's Junius: The Letters of Junius From The Latest London Edition* (2 Vols. in 1, New York, Levitt & Allen Bros. 1870(?); Carl B. Cone, *Burke and the Nature of Politics, The Age of the American Revolution* (Vol. 1, University of Kentucky Press 1957); Bertram Newman, *Edmund Burke* 57-58 (New York 1969).

Finally, the Government's argument that a verdict of guilt in this case is required, *see* Trial Transcript dated October 15, 1996,

The Court has been cited to no authority by the parties that the Court, when it sits as a fact-finder, does not have that same prerógative of leniency and the Court's own research has disclosed none. Indeed, the policies which underlie that prerogative are even stronger in cases of criminal contempt because the Court, which has issued the Order, must and should have the broadest possible discretion to determine whether the conduct at issue is such that a finding of criminal contempt is necessary to vindicate its authority.

CONCLUSION

The Court finds both Lynch and Moscinski to be not guilty of criminal contempt. Not only does their sincere religious belief render their conduct lacking in the willfulness which criminal contempt requires, but also, the nature of that conduct, which is purely passive as the videotape shows, and which is at the outermost limits of expressive conduct that is not constitutionally protected, is so minimally obstructive as to justify the exercise of the prerogative of leniency. The charge is therefore dismissed.

It is **so ordered**.

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at 38, ignores not only the history referred to above, but also the refusal of juries in Massachusetts to convict admittedly guilty colonial smugglers who evaded British duties on imported tea. Indeed, it was that conduct of colonial juries that led directly to Crown attempts to try smugglers in England, which proved to be a precipitating cause of the Declaration of Independence and the end of British rule in America. *See generally* Alschuler and Deiss, *supra* at 874-75

DATED: New York, New York
January 10, 1997

/s/ John E. Sprizzo
John E. Sprizzo
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. GEOGE LYNCH and CHRISTOPHER MOSCINSKI, Defendants.	ORDER IMPOSING PERMANENT INJUNCTION 95 Civ. 9223 (JES) (Filed Feb. 26, 1996)

Upon consideration of the complaint of the United States filed October 27, 1995, and following hearings held on December 12, 1995, January 23, 1996, and February 21, 1996, at which counsel for both the plaintiff and the defendants appeared and were heard, and pursuant to 18 U.S.C. § 248(c)(2)(B) and Rule 65 of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that defendants George Lynch and Christopher Moscinski, their agents, and all individuals acting in concert with defendants or their agents, are permanently enjoined from violating, or aiding and abetting the violation of, the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248, in any way, including but not being limited to:

1. impeding or obstructing automotive or any other form of ingress into, or egress from, the Women's Medical Pavilion in Dobbs Ferry, New York; and

2. attempting to take – or inducing, encouraging, directing, aiding, or abetting in any manner others to

take – any of the actions set forth in subparagraph 1 of this order.

Dated: New York, New York
February 23, 1996

/s/ John E. Sprizzo
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. GEOGE LYNCH, Defendant.	95 Civ. 9223 (JES) ORDER HOLDING DEFENDANT IN CIVIL CONTEMPT AND DENYING PLAINTIFF'S REQUEST FOR STATUTORY DAMAGES (Filed Aug. 27, 1996)

Upon consideration of the application of the United States filed on April 9, 1996, and following argument held on April 17, 1996 and July 19, 1996, at which counsel for both the plaintiff and the defendants appeared and were heard, and pursuant to 18 U.S.C. § 248 and Rule 65 of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that defendant George Lynch is in civil contempt of court for violating the Order Imposing Permanent Injunction, dated February 23, 1996, by blocking ingress into, and egress from, the Women's Medical Pavilion in Dobbs Ferry, New York on April 3, 1996.

IT IS HEREBY FURTHER ORDERED that, plaintiff having requested the awarding of statutory damages in the amount of $5,000, pursuant to 18 U.S.C. § 248(c)(2)(B),

for the defendant's April 3, 1996 violation of the Order Imposing Permanent Injunction, such request is DENIED, for the reasons set forth in the record of the proceedings held on July 19, 1996. Jes

Dated: New York, New York
August 24, 1996

/s/ John E. Sprizzo
UNITED STATES
DISTRICT JUDGE

TABLE
ANNUAL LEGAL ABORTIONS IN THE U.S.A., 1967-1996

Year	Legal Abortions Committed	Year	Legal Abortions Committed
1967	57,160	1982	1,573,920
1968	114,330	1983	1,575,000
1969	171,490	1984	1,577,180
1970	228,650	1985	1,588,550
1971	574,090	1986	1,574,000
1972	693,380	1987	1,559,110
1973	744,610	1988	1,590,750
1974	898,570	1989	1,566,900
1975	1,034,170	1990	1,608,600
1976	1,179,300	1991	1,556,510
1977	1,316,700	1992	1,528,930
1978	1,409,600	1993	1,522,890*
1979	1,497,670	1994	1,516,860*
1980	1,553,890	1995	1,510,820*
1981	1,577,340	1996	1,504,790*

Total Legal Abortions, 1967-1996: 36,405,760

* – estimates.

REFERENCE: Stanley K. Henshaw and Jennifer Van Vort. "Abortion Services in the United States, 1991 and 1992." *Family Planning Perspectives*, May/June, 1994, pp. 100-112, Table 1 (1973-1992 figures). Centers for Disease Control and Prevention, *Surveillance Summaries*, 4 September 1992 (1970-1972 figures). 1967-1969 figures allocated and interpolated by state.